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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 LENIN GARCIA,

12 Petitioner,

13 v.

14 GEORGE NEOTTI, et al.,

15 Respondents.

Civil No. 10-1695 LAB (POR)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE AND WITH
LEAVE TO AMEND**

16 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas
17 Corpus pursuant to 28 U.S.C. § 2254.

18 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

19 Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma
20 pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or
21 qualified to proceed in forma pauperis. *See* Rule 3(a), 28 U.S.C. foll. § 2254.

22 **FAILURE TO USE PROPER FORM**

23 Additionally, a Petition for Writ of Habeas Corpus must be submitted in accordance with
24 the Local Rules of the United States District Court for the Southern District of California. *See*
25 Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be
26 submitted upon a court-approved form and in accordance with the instructions approved by the
27 Court. Presently, Petitioner has submitted an application for writ of habeas corpus on a non-
28 approved form.

FAILURE TO STATE A COGNIZABLE CLAIM ON HABEAS CORPUS

Upon review of the Petition, it also appears to the Court that a Petition for Writ of Habeas Corpus brought pursuant to § 2254 is not the proper vehicle for the claims Petitioner presents. Challenges to the fact or duration of confinement are brought by petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254; challenges to conditions of confinement are brought pursuant to the Civil Rights Act, 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475, 488-500 (1973). When a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus. *Id.* at 500. On the other hand, a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody. *Id.* at 499; *McIntosh v. United States Parole Comm'n*, 115 F.3d 809, 811-12 (10th Cir. 1997).

It appears that Petitioner challenges the conditions of his prison life, but not the fact or length of his custody.¹ Petitioner's main complaint is that he was found guilty of a rules violation. Petitioner admits, however, that he did not lose any credits as a result of the violation. (*See* Pet. at 3.) Petitioner's claims are not cognizable on habeas because they do not challenge the constitutional validity or duration of confinement. *See* 28 U.S.C. 2254(a); *Preiser*, 411 U.S. at 500; *Heck v. Humphrey*, 512 U.S. 477, 480-85 (1994). "Section 2254 applies only to collateral attacks on state court judgments." *McGuire v. Blubaum*, 376 F. Supp. 284, 285 (D. Ariz. 1974).

In no way does Petitioner claim his state court conviction violates the Constitution or laws or treaties of the United States. Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a habeas petition "[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Rule 4, 28 U.S.C. foll. § 2254. Here, it is plain from the petition that Petitioner is not presently entitled to federal habeas relief because he has not alleged that the state court violated his federal rights.

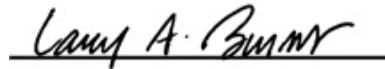
¹ Petitioner has already filed a § 1983 complaint in this court, 10cv1187 BEN (RBB).

CONCLUSION

For all the foregoing reasons, the Court **DISMISSES** this case without prejudice and with leave to amend. If Petitioner wishes to challenge the validity of a state court conviction via a habeas corpus action, he must submit, **no later than October 25, 2010**: (1) a copy of this Order with the \$5.00 fee **OR** with adequate proof of his inability to pay the fee; **AND** (2) a First Amended Petition which cures the pleading deficiencies outlined in this Order. If Petitioner wishes to challenge the conditions of his confinement, he must file a new civil complaint pursuant to 42 U.S.C. § 1983 which will be given a new civil case number. **THE CLERK OF COURT IS DIRECTED TO MAIL PETITIONER A BLANK MOTION TO PROCEED IN FORMA PAUPERIS FORM, A BLANK FIRST AMENDED PETITION FORM, AND A BLANK CIVIL RIGHTS COMPLAINT FORM PURSUANT TO 42 U.S.C. § 1983 TOGETHER WITH A COPY OF THIS ORDER.**

IT IS SO ORDERED.

DATED: August 20, 2010



HONORABLE LARRY ALAN BURNS
United States District Judge